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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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Civil 25-185

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PUBLIC SERVICE COMMISSION, THE SAME BEING THE STATE DIVISION OF THE DEPARTMENT OF PUBLIC SERVICE OF THE STATE OF NEW YORK; CITY OF YONKERS; AND JOHN W. TOOLEY, JR., AS PRESIDENT OF COMMITTEE OF YONKERS COMMUTERS, A VOLUNTARY UNINCORPORATED ASSOCIATION, COMPOSED OF MORE THAN SEVEN PERSONS,

*Plaintiffs,*

*against*

UNITED STATES OF AMERICA AND THE NEW YORK CENTRAL RAILROAD COMPANY,

*Defendants,*

and

INTERSTATE COMMERCE COMMISSION,

*Intervening-Defendant*

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## STATEMENT AS TO JURISDICTION ON APPEAL

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The plaintiffs in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal respectively represent:

A

**Statutory Provisions Sustaining Jurisdiction**

Sections 41, 41-(27), 41-(28), 44, 47 and 47a, Title 28 of the United States Code, being the Act of Congress approved June 30, 1926, provide as follows:

"Sec. 41. *Original Jurisdiction.* The district courts shall have original jurisdiction as follows:

"Sec. 41, Subd. (27). *Enforcement of Orders of Interstate Commerce Commission.* Twenty-seventh. Of all cases for the enforcement of any order of the Interstate Commerce Commission. Mar. 3, 1911, c. 231, § 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219."

"Sec. 41, Subd. (28). *Setting Aside Order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

"Sec. 44. *Procedure in certain cases under interstate commerce laws; service of processes of court.* The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

"Sec. 47. *Interlocutory Injunctions as to Orders of Interstate Commerce Commission; Appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring may, on hearing, after not less than three days' notice to Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory

injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

"Sec. 47a (*Judicial Code, Section 210.*) *Appeal to Supreme Court from Final Decree; Time for Taking; Priority.* A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other

causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

B

**The Statutes Involved Are Section 1, Paragraphs 18 and 22 of the Interstate Commerce Act (Title 49 of the United States Code).**

"Sec. 1, Par. (18). *Extensions or Abandonment of Lines; Certificate Required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

"Sec. 1, par. (22) *Construction, etc., of spurs, switches, etc. within State.* The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

C

**Date of Judgment and Date Upon Which Application for Appeal Was Presented**

The final judgment sought to be reviewed was entered on the 17th day of July, 1944, and the application for the appeal was submitted on the 11th day of August, 1944.

D

**Nature of Case and Rulings Below**

On April 13, 1944, the plaintiffs above named, instituted a suit against the United States of America and The New York Central Railroad Company by filing a petition in the United States District Court for the Southern District of New York pursuant to Sections 41-(27), 41-(28) and 44 of Title 28 of the United States Code. The petition prayed that the District Court enjoin, set aside, annul and suspend an order and certificate of the Interstate Commerce Commission dated February 25, 1944, in a proceeding designated as Finance Docket 13914 permitting The New York Central Railroad Company to abandon that portion of its so-called Yonkers Branch line extending from Van Cortlandt Park Junction, New York City to Getty Square, Yonkers in Westchester County, a distance of about approximately 3.1 miles, all within the State of New York.

On the same day that the petition was filed, an order to show cause was duly signed by one of the judges of the District Court, upon the application of the plaintiffs, why a temporary or interlocutory judgment should not be granted suspending and restraining the enforcement, operation or execution of the aforesaid order and certificate of the Interstate Commerce Commission of February 25, 1944. The order to show cause was made returnable on May 4, 1944, be-

fore a Statutory Court consisting of three judges at least one of which shall be a Circuit Court Judge, pursuant to Section 47 of Title 28 of the United States Code.

The Interstate Commerce Commission was permitted to intervene.

The United States of America, The New York Central Railroad Company and the Interstate Commerce Commission filed answers.

At the return date of the order to show cause on May 4, 1944, all parties consented that the hearing be considered as a final hearing; in addition to the record made before the Interstate Commerce Commission, a few exhibits were offered in evidence by the plaintiffs and defendants. On July 17, 1944, the Statutory Court rendered its decision holding that the application for final injunction should be denied and the petition dismissed.

On the 17th day of July, 1944, a judgment was made and entered denying the plaintiffs' application for a final injunction and dismissing the petition of the plaintiffs. An appeal from said judgment was applied for on the 11th day of August, 1944.

## E

### Cases Believed to Sustain Jurisdiction

The following decisions are believed to sustain jurisdiction of this appeal:

*Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1;

*New England Divisions Case,* 261 U. S. 184;

*Manufacturers H. & R. Co.* v. *United States,* 246 U. S. 257;

*Texas* v. *Eastern Texas R. R. Co.,* 258 U. S. 204;

*Colorado* v. *United States,* 271 U. S. 153;

*Transit Commission* v. *United States*, 284 U. S. 360; *City of Yonkers* v. *United States*, 320 U. S. 685; *United States* v. *Idaho*, 290 U. S. 105.

We respectfully submit that the Supreme Court has jurisdiction of this appeal by virtue of Sections 41, 41-(27), 41-(28), 44, 47 and 47 (a), Title 28 of the United States Code.

Dated, New York, N. Y., August 11th, 1944.

Yours, etc.,

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## APPENDIX A

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

Civ. No. 25-185.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK et al., *Plaintiffs*,

*v.*

UNITED STATES OF AMERICA et al., *Defendants*.

Before Clark, Circuit Judge, and Caffey and Rifkind, District Judges.

Action by the Public Service Commission of the State of New York, City of Yonkers, and John W. Tooley, Jr., as president of Committee of Yonkers Commuters, a voluntary unincorporated association, against the United States of America and the New York Central Railroad Company, with the Interstate Commerce Commission as intervening defendant, to set aside a commission order authorizing the abandonment of a line of railway within the State of New York. Judgment for the defendants.

Philip Hodes, of New York City (Philip Halpern, of Albany, N. Y., on the brief), for plaintiff Public Service Commission.

John J. Broderick, Corp. Counsel, of Yonkers, N. Y., for plaintiff City of Yonkers.

Horace M. Gray, of New York City, for plaintiff John W. Tooley, Jr.

Robert L. Pierce, Sp. Asst. to Atty. Gen., of Washington, D. C. (James B. M. McNally, U. S. Atty., and William L. Lynch, Asst. U. S. Atty., both of New York City, and Wendell Berge, Asst. Atty. Gen., of Washington, D. C., on the brief), for defendant United States.

J. Stanley Payne, Asst. Chief Counsel, Interstate Commerce Commission, of Washington, D. C. (Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, of Washington, D. C., on the brief), for defendant Interstate Commerce Commission.

Harold H. McLean, of New York City (Thomas P. Healy, of New York City, on the brief), for defendant New York Central Railroad Company.

CLARK, *Circuit Judge:*

Plaintiffs, suing under 28 U. S. C. A. §§ 41(28), 43-48, seek to enjoin and set aside a certificate and order of the Interstate Commerce Commission authorizing defendant New York Central Railroad Company to abandon its so-called Yonkers branch line, which extends for a distance of 3.1 miles in Bronx and Westchester counties, New York, between Getty Square in the city of Yonkers and Van Cortlandt Park Junction in the city of New York. The Commission first authorized abandonment of this branch on March 20, 1943, and this court sustained the Commission's act a year ago in an action brought by the same plaintiffs. *Public Service Commission of State of New York* v. *United States*, D. C. S. D. N. Y., 50 F. Supp. 497. The Supreme Court, however, on appeal reversed this judgment, without consideration of the merits, because the Commission had failed to perform the requisite administrative function of making appropriate jurisdictional findings to support its order. The Interstate Commerce Act, as amended by the Transportation Act of 1920, gives the Commission authority to issue certificates of public convenience and necessity allowing any carrier subject to the Act to abandon "all or any portion" of its railroad line, 49 U. S. C. A. § 1(18)-(20); but it further provides that this authority shall not extend to the "abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." *Ibid.* § 1(22). The Commission had not made express findings showing that the line was not within this exception; and in the absence of

such "requisite jurisdictional findings," the Court held that the order should have been set aside. *City of Yonkers* v. *United States*, 320 U. S. 685, 692. The Commission thereupon on its own motion reopened the proceedings, and, after the taking of additional evidence and the submission of briefs by all parties, issued the present order and report on February 25, 1944, the order to become effective on March 30, 1944. Thereafter the Commission denied petitions for reconsideration in a supplemental report and order dated March 24, 1944, and this action followed. Inasmuch as an interlocutory injunction was sought, the action now comes before a statutory district court of three judges. 28 U. S. C. A. § 47. At the hearing, however, all parties agreed that the action should be considered upon the merits and disposed of finally at this time.

The general facts are fully stated in the opinion of the Supreme Court, as well as in the previous opinion of this court, and need not be restated in detail here. The certificates of the Commission authorized a complete abandonment and dismantlement of the Yonkers branch; and in fact, service on the line ceased on June 30, 1943. Such cessation of service by the Central has been continuously lawful, for the Supreme Court on June 21, 1943, refused to grant a stay of this court's judgment sustaining the original abandonment order, 63 S. Ct. 1450, and subsequently stayed the effective date of its own mandate reversing our judgment until the Commission's new order became effective, 64 S. Ct. 517, 633. The rails and other appurtenances of the line have, nevertheless, been kept intact pending the outcome of this litigation.

In the light of these previous proceedings, the crucial question before us is, of course, the jurisdiction of the Commission to enter the abandonment order. In its reports of February 25, 1944, and March 24, 1944, the Commission made painstaking subordinate findings as to the facts upon which exemption under §1(22) of the Act had been asserted, and concluded that "the Yonkers branch is not a street, suburban or interurban electric railway within the contemplation of section 1(22), but is an electrically operated

branch of a general steam railroad system, and that, even though there were doubt concerning its status as an electric railway, it would yet not be within the exemption of section 1(22), since it is operated as a part of applicant's general steam railroad system of transportation." Such findings, both subordinate and ultimate, surely meet the criticisms of the previous order by the Supreme Court; and, since they were the express objective of the Supreme Court's order of reversal, they must be entitled to at least *prima facie* weight in our considerations here.

Actually, the effect to be given by the courts to administrative findings of "jurisdictional facts" is not clear, as indeed, the majority and minority opinions rendered by the Supreme Court in the present proceedings show. Thus, they pointed out, 320 U. S. at page 689, that the determination of what is included within the exemptions of §1(22) has been held to involve a "mixed question of fact and law" upon which the final word is left with the courts,[1] citing *United States* v. *Idaho,* 298 U. S. 105, 109, also that the aid of the Commission need not be sought, and the Commission need make no basic findings of jurisdictional facts, before the jurisdiction of a court is invoked under §1(20) to enjoin violations of the provisions of §1(18-22), citing *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266; and *cf.* also *Western Pacific California R. Co.* v. *Southern Pac. Co.,* 284 U. S. 47; *Piedmont & N. R. Co.* v. *I. C. C.,* 286 U. S. 299. But, as the minority pointed out,

[1] The Railway Labor Act contains a substantially similar exemption of interurban electric railways, 45 U. S. C. A. § 151; but there the Interstate Commerce Commission determines only whether a line operated by electric power falls within the proviso upon request of the National Mediation Board of complaint of any party interested. The Act in general creates and defines the authority of the National Mediation Board and of the National Railroad Adjustment Board. It has been held that the power of the courts to review a determination of the Commission as to exemption under § 151 is limited simply to whether the Commission has acted within its authority. *Shields* v. *Utah Idaho Central R. R. Co.,* 305 U. S. 177, 185, and cases cited therein; *Texas Electric R. Co.* v. *Eastus,* D. C. N. D. Tex., 25 F. Supp. 825, affirmed per curiam 308 U. S. 512; *Sprague* v. *Woll,* 7 Cir., 124 F. 2d 767. Hence cases dealing with the power of the Commission under this statutory provision are not pertinent when the issue involves orders made by the Commission under its general powers.

320 U. S. at page 695, "jurisdiction" competes with "right" "as one of the most deceptive of legal pitfalls." Where, as here a court is asked to review an order of the Commission issued upon application for a certificate of public convenience and necessity under §1(18), the initial validity of which is premised upon the existence of basic jurisdictional findings by the Commission, there must of necessity be some amelioration of the doctrine that the question of jurisdiction is for the independent judgment of the court. Otherwise it would hardly have been necessary to return the case for such findings. Indeed, in the light of at least some precedents, we were coming to think that review of "jurisdictional" and "constitutional" facts was more limited than had earlier been thought. *Gray* v. *Powell*, 314 U. S. 402; *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 28, 73; *Steamship Terminal Operating Co.* v. *Schwartz*, 2 Cir., 140 F. 2d 7; Brown, *Fact and Law in Judicial Review*, 56 Harv. L. Rev. 899, 925; Landis, *The Administrative Process*, 1938, 126-135; 41 Yale L. J. 1037; 46 Harv. L. Rev. 478; 80 U. of Pa. L. Rev. 1055; 22 Corn. L. Q. 515.

But, so far as this court is concerned, we do not feel compelled to determine just the exact weight to be accorded to the Commission's findings as to its jurisdiction. For we think that the subordinate facts found—which are, indeed, uncontested—amply support the jurisdiction of the Commission under any theory of the weight to be accorded its ultimate findings. Initially, there can be no doubt that the New York Central is a "general steam railroad system of transportation" within the meaning of the statute. Nor is there any merit to plaintiffs' assertion, made for the first time on petition for reconsideration of the present order, that the Yonkers line is a "spur • • • located wholly within one state" and thus exempt under §1(22). As pointed out in the Commission report of March 24, 1944, there are four agency stations on the line, at which most of the thirty-four regular trains stopped daily except Sundays, and this would hardly bring the line within the scope of any generally accepted definition of the word "spur."

See *United States* v. *Idaho, supra; Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, D. C. E. D. Mich., 286 F. 540, 547; *Atlanta & St. A. B. Ry. Co. Application*, 71 I. C. C. 784, 792; *Acquisition by Iberia & Vermilion R. R.*, 111 I. C. C. 660, 663. Further, "the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress." *Piedmont & N. R. Co.* v. *I. C. C. supra*, 286 U. S. at page 311; *Texas & Pacific Ry. Co.* v. *Gulf C. & S. F. Ry. Co., supra*, 270 U. S. at pages 277-278. In the latter case, a piece of track resembling the usual industrial track much more than the present line resembles a spur was held not to be an industrial track within the exemption of §1(22).

It is not necessary to consider, as did the Commission, whether the Yonkers line is an "interurban electric railway,"[2] for even conceding such status, its operation as a part of the general New York Central steam railroad system seems to us quite clear. As this court pointed out in its previous opinion, the precedents show that the question is a practical one of operation of the railroad. *Public Service Commission of State of New York* v. *United States, supra*, 50 F. Supp. at page 498. And the facts here with respect to the operation of the railroad demonstrate that by reason of interconnection of physical facilities, intertwining of railroad operations, including personnel as well as equipment, together with unity of financial and fiscal functions, we have before us a single railroad system, from which this small branch cannot be lopped off for special treatment without illogical and unrealistic severing of practical railroad ties, with consequences prejudicial to the best operation of the system and the public interest as a whole.

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[2] This is the problem with which the bulk of the cases dealing with this and similar exemption clauses have been concerned. Since the Yonkers line carried only passengers, it is perhaps a close question here, for the courts in the past have laid great stress upon the absence of freight traffic in determining that various lines are within the exemption. *Piedmont & N. R. Co.* v. *I. C. C., supra; United States* v. *Chicago, N. S. & M. R. Co.*, 288 U. S. 1; *Texas Electric R. Co.* v. *Eastus, supra*, note 1; *Sprague* v. *Woll, supra*, note 1.

Reference may first be made to the physical connections between this line and the general system. It is true that the Yonkers branch was originally constructed by an independent company in 1888; but it was leased and operated by the Central's predecessor as early as 1894, and became a complete part of the Central's Putnam Division on April 29, 1914. The Central has three divisions operating trains north from Manhattan and roughly parallel to each other: the Hudson, with trains operating on the east bank of the Hudson River, through Yonkers, being the main line which runs to Albany and thence westward to Chicago; the Putnam, next east of the Hudson, with tracks running beside the latter for about 2½ miles and with actual physical connection of the lines at two points, for trains from Sedgwick Avenue Station at Sedgwick Avenue and West 161st Street, New York City, to a connection with the Harlem Division at Putnam Junction near Brewster, New York; and still further east, the Harlem Division, extending from Mott Haven Junction to Chatham, New York, where it connects with the Central's main line from Boston to Albany. The Yonkers branch made use of the Putnam tracks from Sedgwick Avenue northerly to Van Cortlandt Park Junction, a distance of 4.7 miles, whence the line which is the subject of the order here ran between the Hudson and Putnam tracks to its terminus at Getty Square, where it was .3 of a mile from the Hudson tracks, and .7 of a mile from the Putnam tracks. Although the Putnam Division was steam operated the Yonkers branch was equipped for electrical operation in 1926, both on its branch line proper and for the tracks it used in common with the Putnam trains. Train service consisted of seventeen electric trains each way, daily except Sunday, of two to four multiple-unit cars, operating on the eight-mile run from Getty Square to Sedgwick Avenue and stopping at the eight intermediate stations to receive and discharge passengers.

Thus it appears that the Yonkers branch was physically a part of the Putnam Division—almost concededly a part of the Central's general system—as it was so completely a part from the standpoint of railroad operation. Yonkers trains not only utilized the Putnam tracks from Van Cortlandt Park Junction to their terminus at Sedgwick Avenue,

but also shared other facilities and personnel, such as trainmen, station agents, and maintenance men, with Putnam trains. Everyone at all connected with the Yonkers line was an employee of the Central, which published timetables and issued tickets for the branch. Further, the greatest number of passengers were through commuters to Grand Central, for whom transfer facilities to trains of the Hudson Division, which is conceded to be a part of the general system, were arranged at High Bridge or University Heights. Passengers of this type could purchase through tickets for the whole trip, and the timetables showed the times of arrival of connecting trains of the Hudson Division. Five stations served both Yonkers branch and Putnam Division trains, and three of these also served Hudson Division trains. As to the two switching connections between the Putnam and Hudson tracks—one north of University Heights Station and the other near High Bridge Station—it is true that these were not adapted for ready interchange of *southbound* traffic; but the connection was used for handling a mail car north from Grand Central Station over the Putnam Division each day. And, as this court pointed out before, 50 F. Supp. at page 499, it was necessary for the railroad at all times to reserve seats on Hudson trains for passengers transferring only at the joint stations shared with the Yonkers branch, even though these trains normally came down through Yonkers and these passengers could have made the whole run on them.

Financially, too, connection with the Central System is apparent. The Central has owned the Yonkers line outright for over thirty years, and took all its revenues, as well as absorbed its substantial net operating losses for the past several years. No separate accounts were ever kept, the Yonkers Station accounts being reported in the same manner as accounts from stations on other divisions; and the Central's annual reports have for long treated the Yonkers line part of the general system.

With such congeries of interrelationships, effective administration and operation of the interstate commerce laws demand that jurisdiction over a proceeding of this kind be vested in the Interstate Commerce Commission. Other-

wise, state public service commissions may make limited orders operative only in the interstices of vast transportation systems which may effectively tie the hands of both the system and the Interstate Commerce Commission and operate to the detriment of transcontinental railroad lines which the interstate commerce laws are intended to protect and conserve. *Piedmont & N. R. Co.* v. *I. C. C., supra.* Consider, for example, the situation here if the state commission has the power, as it claims, to order the continuance of the Yonkers line. Unless there is to be a stalemate between the two authorities, that means that this commission can order effective train service into New York City, which means that it can order more train service on the through Hudson lines to Chicago. It is thus not only possible, but highly probable that a limited local service may be forced into priority over one of the most important through lines of the country. The fact that a branch runs wholly within one state and carries no interstate passengers cannot be controlling as to the application of the exemption if, as here, it constitutes an undue financial burden upon the interstate carrier system, *State of Colorado* v. *United States,* 271 U. S. 153; *cf. State of Texas* v. *Eastern Texas R. Co.,* 258 U. S. 204; for the essence of the power over interstate commerce which the several states have surrendered to Congress is the ability to protect it from undue burdens or discriminations. *City of Yonkers* v. *United States, supra,* 320 U. S. at page 690, and cases cited therein. Since by the Constitution this power is lodged in Congress, it should not be the purpose of the courts to delimit its utility and effectiveness with stultifying restrictions.

This view renders clearly inapposite some of the language in *Piedmont & N. R. Co.* v. *I. C. C., supra,* as well as *United States* v. *Chicago, N. S. & M. R. Co.,* 288 U. S. 1, upon which plaintiffs especially rely; for both these cases involved simply the determination of whether electric lines of independent companies, not operating general systems, were "street, suburban, or interurban electric railways," and there were no claims, as, indeed, there could not be, that these lines were operated as part of a general steam rail-

road system. Nor can we agree with plaintiffs' interpretation of *Texas Electric R. Co.* v. *Eastus*, D. C. N. D. Tex., 25 F. Supp. 825, 830-831, affirmed per curiam 308 U. S. 512, as outlawing, on the matter of connection with a general system, all evidence but that of physical connection. A more logical reading of that opinion is that while there must be some physical connections, evidence of financial or economic connections and of common ownership or management is also highly competent. This, too, is the approach which has been consistently followed by the Commission. *Unified Operation at Los Angeles Harbor*, 150 I. C. C. 649, 661; *Sacramento Northern Ry.*, 208 I. C. C. 203, 206, 210; *Hudson & Manhattan R. Co.*, 216 I. C. C. 745, 752; *Pittsburgh L. & W. R. Co. Practices*, 227 I. C. C. 73, 101; *Interurban Electric Ry. Co.*, 227 I. C. C. 589; *New York, Westchester & Boston Ry. Co.*, 218 I. C. C. 253. But, as we have pointed out, even conceding plaintiffs' construction of the authorities, there is quite adequate evidence of purely physical connection here between the local and the through lines of the Central to uphold the jurisdiction of the Commission.

Since, therefore, jurisdiction exists for the Commission's order, we need say little more than was said before, 50 F. Supp. at page 499, on the merits. Here the usual administrative principle does govern to render the Commission's findings conclusive on us if supported by adequate evidence. *United States* v. *Erie R. Co.*, 280 U. S. 98, 102; *I. C. C.* v. *Union Pac. R. Co.*, 222 U. S. 541, 547. There is ample evidence to support the findings that business did not warrant continuance of the line, and that there were other means of transportation readily available to the public. Traffic had been steadily dropping off over the years on the Yonkers line, and the net operating loss is now found to be in excess of $60,000 a year, while two other rail lines and at least two busses ran from Yonkers into New York City. The Commission thus not only had jurisdiction to enter the abandonment order, but also acted within its lawful powers in so doing.

The suggestion of the Commuters Committee that the Commission was disqualified to act because of interest,

since its members are appointed by the President, who has appealed for scrap for war purposes, seems sufficiently fantastic in its tenuity as not to require discussion.

Notwithstanding claims to the contrary made by appellants in the earlier proceeding, no separate findings of fact by us seem necessary or appropriate. But to avoid all doubt we state that we accept and adopt the Commission's findings and approve its conclusions of law. It follows that final judgment must go for the defendants. Accordingly the clerk is directed, immediately upon the filing of this opinion and on the same day, to enter final judgment dismissing the complaint on the merits.

CHARLES E. CLARK,
*U. S. Circuit Judge;*
FRANCIS G. CAFFEY,
*U. S. District Judge;*
SIMON H. RIFKIND,
*U. S. District Judge.*

Judgment rendered.
GEORGE J. H. FOLLMER,
*Clerk.*
Jul. 17, 1944.

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IN THE

# Supreme Court of the United States

No. 479, October, 1944, Term.

PUBLIC SERVICE COMMISSION, the same being the State Division of the Department of Public Service of the State of New York; CITY OF YONKERS; and JOHN W. TOOLEY, JR., as President of Committee of Yonkers Commuters, a voluntary unincorporated association, composed of more than eleven persons,

*Appellants,*

*against*

UNITED STATES OF AMERICA, THE NEW YORK CENTRAL RAILROAD COMPANY and INTERSTATE COMMERCE COMMISSION,

*Appellees.*

## PETITION UNDER RULE 33 OF THE RULES OF THIS COURT AND MOTION FOR STAY OF MANDATE HEREIN.

John J. Broderick,
*Corporation Counsel for Appellant, City of Yonkers.*

Horace M. Gray,
*Attorney for Appellant, John W. Tooley, Jr. as President, etc.*

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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*Appellants,*

*against*

United States of America, The New York Central Railroad Company and Interstate Commerce Commission,

*Appellees.*

## PETITION UNDER RULE 33 OF THE RULES OF THIS COURT AND MOTION FOR STAY OF MANDATE HEREIN.

*To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The appellants, City of Yonkers and John W. Tooley, Jr., as President of Committee of Yonkers Commuters, hereby petition under Rule 33 of the Rules of this Court for a re-consideration of the appeal in this action and for other relief upon the following grounds:

FIRST: By reason of the action taken herein by this Court on or about the 13th day of November, 1944, these appellants have been denied and deprived of the right of appeal granted to them by statute to wit: §§47 and 47a of Title 28, United States Code.

SECOND: These appellants have thereby been deprived of their constitutional right to argue this appeal which is provided for in Rule 28, Paragraph 4, of the Rules of this Court.

THIRD: These appellants have thereby been deprived of an opportunity to file briefs in support of their appeal as provided for by Rule 27 of the Rules of this Court.

FOURTH: That this Court acted upon said appeal without any motion before it to dismiss or affirm as required by Rule 7, Paragraph 4; Rule 7, Paragraph 3; and Rule 12, Paragraph 3, of the Rules of this Court.

FIFTH: These appellants have thereby been deprived even of the right to a hearing upon the summary docket provided for by Rule 7, Paragraph 5; and Rule 28, Paragraph 6, of the Rules of this Court.

SIXTH: That this Court erroneously referred in its *per curiam* opinion handed down on November 13, 1944, to the subject matter of the prior appeal herein as being "on remand * * * to the Interstate Commerce Commission for further findings, * * *.", but, as a matter of fact, the order of this Court entered upon the appeal in the case of *City of Yonkers* v. *United States,* 320 U. S. 685, to which this Court referred, was an unqualified reversal of the decision of the Statutory Court appealed from which had

refused to vacate the order and certificate of the Interstate Commerce Commission dated March 20, 1943, granted upon the application of the New York Central Railroad Company; and this Court was without jurisdiction on the record to remand said Federal Court proceeding to the Interstate Commerce Commission for any action.

SEVENTH: These appellants have thereby been denied due process of law in the prosecution of their appeal as guaranteed to them by the Fifth Amendment to the Constitution of the United States.

EIGHTH: That the rights of the appellants under the Tenth Amendment to the Constitution of the United States have thereby been violated through the failure of this Court to vacate the certificate and order of the Interstate Commerce Commission dated February 25, 1944, permitting the abandonment of the Yonkers Branch spur which is located wholly within the State of New York and which is an interurban electric railway not operated as a part of a general steam railroad system of transportation; upon a record which fails to contain findings sufficient in law to support the order and which lacks evidence essential to support the findings made.

NINTH: The appellant, Tooley, has thereby been deprived of the right properly to present to this Court his assignment of error on this appeal disputing the qualification of the Interstate Commerce Commission to pass upon the application in suit by reason of personal interest of the individual members through their dependence upon President Roosevelt for nomination for reappointment to office as Interstate Commerce Commissioners upon the expirations of their current terms; and through the interference

by the Executive Department with the consideration by the Interstate Commerce Commission of the application in suit for the purpose of obtaining scrap steel alleged to be urgently needed by the Army; whereby these appellants were denied due process of law and their day in Court guaranteed to them by the Fifth Amendment to the Constitution of the United States.

WHEREFORE, these appellants request that the order of November 13, 1944, herein be vacated; that this appeal proceed according to law and the Rules of this Court; that the record be printed; that the appellants be granted an opportunity to file printed briefs in accordance with the Rules of this Court; that they be granted an opportunity for oral argument of this appeal in accordance with the Rules of this Court and that they be granted the hearing guaranteed to them by the acts of Congress and the Constitution of the United States; and hereby move that the mandate herein be stayed until the final disposition of this petition and that the time for the issuance of the mandate of this Court be enlarged to January 15, 1945.

December 6, 1944.

Respectfully submitted

JOHN J. BRODERICK,
Corporation Counsel for Appellant,
City of Yonkers.

HORACE M. GRAY,
Attorney for Appellant, John W. Tooley, Jr.,
as President, etc.

I hereby certify that I have examined the foregoing Petition and Motion, that in my opinion they are well founded and entitled to the favorable consideration of this Court and that they are presented in good faith and not for the purpose of delay.

JOHN J. BRODERICK,
Corporation Counsel for
City of Yonkers.

I hereby certify that I have examined the foregoing Petition and Motion, that in my opinion they are well founded and entitled to the favorable consideration of this Court and that they are presented in good faith and not for the purpose of delay.

HORACE M. GRAY,
Attorney for John W. Tooley, Jr.,
as President, etc.

## Additional Certificate.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:
CITY OF YONKERS

JOHN J. BRODERICK, being duly sworn, deposes and says: that he is the attorney for the Appellant City of Yonkers in this case.

That in this case there are substantial questions of law and fact and jurisdictional questions based on law and fact.

That the Plaintiffs (now appellants) in the Court below pray that the District Court enjoin, set aside, annul and suspend the order and certificate of the Interstate Commerce Commission dated February 25, 1944, in a proceeding designated as Finance Docket 13914 permitting the New York Central Railroad Company to abandon a portion of its so-called Yonkers Branch for a distance of about approximately 3.1 miles, all within the State of New York.

That this case was duly heard by the Statutory Court below and on or about the 17th day of July, 1944 a Judgment was made and entered denying the plaintiffs' application for a final injunction and dismissing the petition of the plaintiffs.

That we believe as a matter of right because of the nature of this action, the Appellants herein are entitled to appeal on the merits by reason of the provisions of Sections 47 and 47(a) of Title 28 of United States Code.

That in accordance with the provisions of said Sections 47 and 47(a), an appeal from said Judgment was applied for on the 11th day of August, 1944, within thirty days after the said Judgment was made and entered.

That Section 47 of Title 28 of United States Code provides:

> *"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the*

*final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.*" (Italics ours.)

See *Stafford* v. *Wallace*, 258 U. S. 495.

That in addition, when the original case was before the Federal Supreme Court in *City of Yonkers* v. *United States*, 320 U. S. 685, this statement was made in the prevailing opinion of Mr. Justice Douglas:

> "The Commission itself has noted that in the 'construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways.' Annual Report (1928), p. 80. That difficulty is apparent here by the division of opinion which exists in the Court whether this Yonkers branch is an 'interurban electric' railway which is 'operated as a part' of the New York Central system. Sec. 1 (22)."

That this question of jurisdiction is still open notwithstanding the Findings of Fact approved by the Court below.

That because of the importance of the subject involved on the two jurisdictional questions raised, viz., the right to appeal and second the jurisdiction of the Interstate Commerce Commission, your deponent believes that an opportunity should be given to the Appellants to present a printed Case on Appeal and have oral argument on the same.

Your deponent makes this application in good faith and not for the purpose of delay.

JOHN J. BRODERICK.

Sworn to before me this
6th day of December, 1944.

MARGARET V. WALSH,
City of Yonkers, N. Y.
Notary Public, Westchester County.

No. 479. PUBLIC SERVICE COMMISSION (STATE DIVISION OF THE DEPARTMENT OF PUBLIC SERVICE OF NEW YORK) ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. November 13, 1944. *Per Curiam:* On remand of the case of *City of Yonkers* v. *United States*, 320 U. S. 685, to the Interstate Commerce Commission for further findings, the Commission reopened the case, took further evidence, and made additional findings. Upon examination of the case now here on appeal we conclude that those findings are sufficient to support the order, and the evidence is sufficient to support the findings. The judgment is affirmed. *Messrs. John J. Broderick, Philip Halpern,* and *Horace M. Gray* for appellants. Reported below: 56 F. Supp. 351.